Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 390.

WILLIAM B. DINSMORE AND OTHERS

vs.

THE RAILROAD COMMISSION OF THE STATE OF GEORGIA AND THE SOUTHERN EXPRESS COMPANY.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to Review and Reverse Decision of the Circuit Court of Appeals as Reported in 102 Federal Reporter, 794, Reversing Decision in the Court Below Reported 92 Federal Reporter, 714.

BRIEF OF FRANK H. MILLER FOR PETITIONERS.

STATEMENT OF THE CASE.

1. The Railroad Commission of the State of Georgia on the 11th of July, 1898, upon a *representation* that the Southern Express Company had since the act of Congress of June 13, 1898, exacted and continued to exact from shippers as a condition precedent to forwarding any goods tendered to it for transportation between points within the State of Georgia the payment of the special tax upon such shipments imposed by the said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by the Commission, ordered the Company to appear July 18, 1898, to show cause why it should not be held to have violated the rules and regulations of the commission by the exactions of overcharges as aforesaid, and *why suit should not be instituted* against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act.

The Company appeared and denied all jurisdiction on the part of the Commissioners in the premises, who, (see Record 55) adopted the opinion of Commissioner Atkinson, that under the act of Congress the express company was required to furnish the stamp, and on August 2, 1898, ordered

and directed the said stamp tax to be furnished, attached, cancelled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part. Petitioners notified the Company to contest the validity, legality and constitutionality of the action of the Commissioners and protect the shareholders by applying to a court of competent jurisdiction to determine the liability of the Company, and such further steps as were necessary to protect the rights of the shareholders.

The Company refused, because a failure to comply with the requirements of the order of the Commissioners of August 2, 1898, would subject it to litigation with the authorities of the State of Georgia and the said Railway Commission, and the Company would run the risk of incurring penalties under the laws of Georgia, and of so clouding its title to its corporate franchises and rights as to embarrass its action.

The Directors of the Company, however, directed a new application to be made to the Commission to be allowed to collect from the shipper in addition to the existing rates sanctioned by the Commission the amount of war revenue tax held by the said Commission to be payable by the Company, which application the Commission refused.

Notice of this refusal was given to the Complainants, stating it was deemed expedient to comply with the orders of the Railroad Commission in the premises and that the company was then observing the Georgia Railroad Commission's rates on inter state business, and was, as to such business, paying the amount of war revenue tax without charging the same to the shipper or endeavoring to collect the same from the shipper.

2. This bill was filed to enjoin the Company from continuing to make this payment, the Railroad Commission from ordering, and the Attorney-General from instituting any suit of any sort for the purpose of enforcing the provisions of the said order of the Railroad Commission.

The Bill alleged that the tax imposed by the said war revenue law of 1898, as required by the said order of the said railroad commission, would aggregate to the Southern Express Company in the State of Georgia, annually, the sum of forty-two thousand dollars ($42,000) or other large sum, and that the said railroad commission were without any authority under the constitution and the legislative acts of the State of Georgia or under the said act of Congress approved June 13, 1898, to require the payment of the said stamp tax by said company, upon and before issuing its receipts and bills of lading; petitioners averring, also, that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the railroads cannot be compelled to do this for the express company, and there is no prescribed limit to their charges against the Southern Express Company, as they are not charges made against the public; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroads is 50 per cent. of the express company's gross receipts; that it costs the express company 43 per cent. of its receipts to do its business, and this, added to the average 50 per cent. which must be paid to the railroads,

makes the total cost to the express company 93 per cent. of its receipts. A considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. Take 93 per cent. from these charges and there is left a margin of seven-tenths of a cent on the 10-cent packages and one three-quarters of a cent on the 25-cent packages. If the express company is compelled to pay one cent each on the receipts, it loses three-tenths of a cent on every 10-cent package and makes only three-quarters of a cent on the 25-cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders, like petitioners. That under section nine of the act of the General Assembly of the State of Georgia, approved December 24, 1896, Public Laws 28—to levy and collect a tax for the support of the State government for the years 1897 and 1898—all persons or companies doing an express business and charging the public therefor in the State of Georgia were required to "pay 2½ per centum on their gross receipts," and all persons or the superintendent or general agent of each express company were required to make a quarterly return under oath, in the form therein prescribed, under a penalty of indictment, conviction, and punishment, pursuant to section 1039 of volume III of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter; that under the provisions of this act, in the imposition of this tax and the enforcement thereof, no deduction will be allowed for the expense the company is subjected to in complying with the said order of the railroad commission and in making payment itself of the stamp tax imposed by the said revenue act of Congress. In other words, the corporation will be paying a tax to the State upon the entire aggregate sum paid out for stamps, as required by the order of the railroad commission, which payment will come out of the gross income of the company.

3. That there is no reason to believe that there can be and will be an increase in the local and other State business of said company; that the cost of conducting said business has been fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted and by which the public can be satisfactorily served by said express company; that the charges fixed by said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate, and pay a fair dividend or return to its owners for the money and property embarked in the said business, and that the order of the said commisioners requiring the payment by the said company of the said one cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by said commissioners illegally and arbitrarily, and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said ser-

vice will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under which it must do business, by the order of said commission, will result in irreparable damage and injury and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars ($40,000) per annum and a loss to petitioners in a decreased value of their shares of ten thousand dollars or other large sum.

4. The Commissioners met the application for an injunction in the present suit by a demurrer with proof of the schedule of rates taken from their report to the executive. They demur generally because the allegations in the bill do not entitle complainants to any relief, and because there is no equity therein; and, for special cause of demurrer say complainants have an adequate remedy at law, exclusive jurisdiction being in the State Courts; comprises matter entirely within the jurisdiction and discretion of the Commissioners over which the Courts have no control, there being no denial of the constitutional rights of the complainants alleged by them for any gross abuse of discretion, and it is in effect a suit against the State without her consent, contrary to the Eleventh Amendment of the Constitution of the United States, the penalty suits being required to be brought in the name of the State and the sums recovered paid into the State's treasury.

5. Upon hearing the bill and demurrer the Court passed the following order:

"The above-stated cause having been duly assigned for hearing "on the application of temporary injunction, at Augusta, in said "District, on the 10th day of February, 1899, and the parties hav- "ing been fully heard on the bill and the demurrer thereto, and the "Court having taken time for advisement:

"It is now upon consideration ordered, adjudged and decreed, "That the prayer that the Southern Express Company be enjoined "from voluntarily paying the war stamp tax in question be and "the same is hereby denied. Ordered, adjudged and decreed fur- "ther, That the defendants, the Railroad Commission of Georgia "and each member thereof, to-wit: the individual defendants, "Leander N. Trammell, Thomas C. Crenshaw, Jr. and Spencer R. "Atkinson, be and the same are hereby enjoined from any and all "order, direction, action or legal steps instituting or tending to "institute, and from any and all proceedings for the recovery of the "penalties named in the statute of Georgia in that behalf to enforce "compliance with its said order against the Southern Express Com- "pany, its officers or agents as threatened in the order of said Com- "mission dated August 2, 1898, for the reason that said order is "null and void, and said commission has no jurisdiction to adjudge "and designate the party who shall pay said tax.

"Ordered further, That the cause proceed as usual in equity.

"March 7th, 1899. EMORY SPEER, U. S. Judge."

6. The Commission appealed. (See par. 14 of petition for Certiorari, Record p. 36.) The Complainants entered a cross-appeal, as the Court had decided that the duty of the Express Company "must of necessity be determined by the construction of the United States law;" and complained that no injunction was ordered against the Express Company (Record p. 40.) The Circuit Court of Appeals reversed Judge Speer and ordered the bill dismissed by a divided Court by Judges McCormick and Pardee (Record pp. 57-61.) Judge Shelby dissented (See his opinion), (Record p. 61.)

ASSIGNMENTS OF ERROR.

Petitioners insist that the judgment rendered by the Circuit Court of Appeals of the Fifth District, is erroneous, and should be reversed for the following reasons:

1. Because it confirms an illegal order of the State Railroad Commission, a body created to regulate freight and passenger tariffs, which order expressly designates *who shall or who shall not pay the* constitutional stamp duty or tax levied by the Act of Congress, and further orders said tax to be paid in a manner contrary to the said act of Congress, when under the Contitution creating the Federal Government, neither the states, nor such a commission created by and existing under their laws, have the right or power so to designate as to who shall or shall not pay taxes levied and due to the General Government.

2. Because the Circuit Court of Appeals having determined—

> "that the issue between the Railroad Commission of Georgia and "the Southern Express Company was: Had that company the "right to add to the maximum charges prescribed by the Commis- "sion the cost of the one cent revenue stamp required by the Act "of Congress to be attached to a receipt issued in each case of "shipment;"

and that:

> "As the Act of Congress in question does not purport to fix or "affect the rates which carriers may charge for transportation,"

erred, when it held that the Railroad Commission of Georgia, a State administrative Board, had the power under the laws of Georgia to provide for the collection of and define who was to pay for the said Internal Revenue stamp or duty, laid by the Federal government on each shipment by express within the State of Georgia, had held that the express company should pay, and that the company could not contract with the shipper for its payment.

3. Because said Court also erred when it thus enlarged and extended the powers of said Commission, and reversed the Circuit Court, which had correctly held, 92 F. R., 715, that:

> "The question whether the war stamp tax imposed by the United "States upon the manifests and bills of lading of express com-

"panies, shall be borne by the company or by shippers, *is not one* "*within the control* of the administrative officers of a particular "state, and an order of a State Railroad Commission requiring its "payment by the express companies is without jurisdiction and "void;"

and—

"The statute of Georgia giving the Railroad Commission the "power to fix rates for transportation to be charged by express "companies, and imposing penalties for violation of their orders, "*cannot be extended by a construction* to include authority to order "an express company to pay the war stamp tax imposed by the "United States without demanding its payment from shippers, "subject to the same penalties for its violation, such tax having "no relation to the charge for transportation."

4. Because the Circuit Court of Appeals, after having correctly constructed the Act of Congress, as aforesaid, i. e., that it

"does not purport to fix or affect the rates which carriers might "charge for transportation * * for the act of Congress "neither prohibits nor authorizes such an increase of rates; neither "expressly nor by implication does it contain any provision on "that subject,"

nevertheless erred when it affirmed the action of said Railroad Commission, whereby said one-cent stamp or duty laid by the United States government on each shipment, was by said commission made a part of *the rate of carriage* for the express company in the state of Georgia; which act of the commission was held binding on the company, and that any effort made by the company to contract with or have the shipper pay said stamp would be an illegal increase of the rates of carriage fixed by the commission, and subject the company to heavy penalties. The error of the Court being:

(*a*) In affirming and making binding on the company the said ruling that this stamp duty was *a part of the rate of carriage*, when it had just decided the contrary, by holding that said Act of Congress did not "contain any provision" on the subject of rates; and particularly so when it affirmatively appeared that the rates of carriage fixed by the commission were the same now as they had been, before the passage of the said Revenue Law by Congress; and

(*b*) When it affirmatively appeared that the express company did not receive any part of this one-cent duty thus paid to the government; and

(*c*) That under the rates fixed by the Railroad Commission, said company was entitled to receive, say 25 cents for the carriage of a package from Augusta to Atlanta; but, that under the ruling of the Commission, and said Circuit Court of Appeals requiring the company to pay for said stamp, it would only receive 24 cents for the transportation of such a package—the extra cent being paid the government, and not received by the company—and thus, to the extent of one cent per

package, the company was unjustly deprivsd of its property, and required to serve the public at too low a rate; and

(*d*) Because the Court of Appeals in effect held that, notwithstanding the decisions of this Court to the contrary, in the *Hubbell* and *Maynard* cases, *supra*, still the Southern Express Company could not contract with the shipper to pay for said stamp, when, both under the laws of Georgia and said Act of Congress, it had the legal right to make such contract for carriage.

5. Because the Court erred when it held—

"That the increase which the carrier proposes to make, by adding "the tax imposed by the war revenue act, does manifestly discrimi- "nate, largely and unjustly, between the shipper of a small package "for a short distance at a low price and a shipper of a larger "package for the longer distance at the lower rate. Though each "shipper is charged one cent, the relations of this charge to the "service is unequal;"

the error of the Court being that it failed to discriminate between what was a rate of carriage for a given service, and what was a tax or excise duty imposed by the United States government upon a transaction called into existence by the voluntary act of a shipper, such tax or duty being by the federal Constitution required to be uniform throughout the United States; petitioners insisting, that, under the war revenue law, no duty is laid nor tax required to be paid unless the sender of a package desires to make use of the transportation facilities afforded by an express company, and that the Court erred in denying to said express company the right to contract with said shipper for the payment of this tax on the shipment, and in holding that this was an increase in rates, was unjust, and would discriminate between shippers as stated.

6. Because the Court erred when it held that the rates of the commission were not unreasonable and not too low when it required the express company to pay the stamp tax from the income it received from the maximum rates fixed by said commission, in addition to the other burdens put upon the company by law, petitioners contending that if such ruling is legal, the rates prescribed for the company are too low, and require it to serve the public, if not at a loss, at too low a sum for the property invested.

7. Because the Court erred when it held that there were no sufficient facts alleged in the bill to show that the rate prescribed by the Railroad Commissioners was unreasonable, it appearing from the allegations of the bill, paragraph 11, that the charges on the gross income of the express company were: 50 per cent. to the railroad company for carriage; 45 per cent. for expenses, 2½ per cent. in taxes, a total of 95½ per cent., leaving a net income from the property invested of one 4½ per cent, which in itself would be materially reduced by the requirement of paying the stamp tax, which in the State of Georgia alone

would amount to $42,000 on local business, and that if the order of the commission was enforced, the rates would be too low, and result in irreparable loss and damage to the company, and such rates would be unfair, unjust and unreasonable. Further, the Court erred in dismissing the bill for not avering what was its income from its *inter-state* business, when this business was not involved in the suit.

8. Because the Court erred when it ordered the bill dismissed, when there was no special demurrer pointing out the defects suggested by the Court in the bill, petitioners insisting that they should have had an opportunity to amend to meet these defects of which they had no notice, the same having never been suggested in the Court below nor in Court of Appeals, but originated with the Court of Appeals itself.

9. Because the Court rendered a final decree June 1, 1900, dismissing the bill against all defendants.

BRIEF OF THE ARGUMENT.

1. The jurisdiction of the Circuit Court in this suit was, as against the Railroad Commission of Georgia, based on the fact, that they were citizens of a different State from complainants, one citizens of Georgia and the others of New York. This as against the Commission and their acting outside of the sphere of their duties, did not necessitate a construction of the War Revenue Act, but as against the Express Company and its paying for stamps under the order of the Commission, its construction was involved. The decision of the Circuit Court of Appleas was final as to the Railroad Commission.

This is an application to this Court to review, "by certiorari or otherwise," a case finally determined in the Circuit Court of Appeals, Fifth Circuit. This power given by the Act creating the Circuit Court of Appeals has been frequently exercised. In a recent case this Court said:

> "That while this power is co-extensive with all possible necessities and "sufficient to secure in this Court a final control over litigation in all the "Courts of Appeals, it is a power which will be sparingly exercised, and "only when the circumstances of the case satisfy us that the importance "of the questions involved, the necessity of avoiding a conflict between "two or more Courts of Appeal or between Courts of Appeal and the "courts of a State, or some other matters affecting the interests of this "nation in its internal or external relations demands such exercise." *Forsythe vs. Hammond*, 166 U. S., 166, 514.

The application for certiorari comes under this ruling. Petition Paragraphs 19 and 20 are as follows:

> "19. That the questions involved in said suit are of gravity and "importance to the nation at large:
>
> "*First.* In having defined the power, if any, and the limits of "the power, that state administrative boards have to determine who

"shall or who shall not pay, a stamp duty lawfully imposed by the "Congress of the United States, when under the Constitution the "power was given Congress 'to lay and collect' taxes, etc., said "Circuit Court of Appeals having in effect held that the Georgia "Railroad Commission had the power to determine who shall pay "said stamp duty, and to enforce the collection thereof by State "statutory penalty suits.

"*Second.* To the shipping public and the express companies "throughout the United States, as to who is required by the said "Act of Congress to pay the stamp duty on packages transported "by express within the several states comprising the United States, "said Circuit Court of Appeals having confirmed an order that the "express company only was required to pay.

"*Third.* In having adjudicated, whether or not an excise duty, "lawfully imposed by the Congress of the United States, under the "constitutional provision that all such 'shall be uniform through-"out the United States,' can be held, in a case where a one-cent "stamp on an express receipt is required by the company to be "attached to the shipper: 'To manifestly discriminate, largely and "'unjustly, between the shipper of a small package for a short "'distance at a low rate and the shipper of a larger package the "'longer distance at the larger rate.'

"These matters affect the internal regulations of the country at "large; the former, the relations between the general government "and officers of the states; and petitioners charge that the decision "of the said Circuit Court of Appeals as to the first question is in "conflict with the fundamental principles underlying the decisions "of this Court in *McCullough* v. *The State of Maryland*, 4 Wheat., "316; *Weston* v. *City Council of Charleston*, 2 Pet., 449; *Crandall* "v. *Nevada*, 5 Wall., 46; and *Knowlton* v. *Moore*, decided May 14, "1900; in the former of which, this Court, speaking of Chief Jus-"tice Marshall, said:

> "The States have no power by taxation or otherwise, to retard, "impede, burden or in any manner control the operation of the "constitutional laws enacted by Congress to carry into execution "the powers vested in the general government."

"And as to the second and third questions, said decision con-"flicts with the plain intent of the said Act of Congress itself, and "with the cases of *Hubbell* v. *Crawford* and *American Express Co.* "v. *Maynard*, decided by this Court April 16, 1900, wherein the "Court held, that conceding for the sake of argument that the "stamp tax in question was imposed by Congress upon the express "company, still the company had a right to pass the tax on to the "shipper, and further that if reasonable rates existed at the time "the stamp act was passed, they were not rendered unreasonable "by adding thereto the stamp duty imposed thereby; and with the

"case of *Knowlton* v. *Moore*, decided May 14, 1900, wherein this "Court construed the uniformity clause of the Constitution, re- "lating to the progressive rate feature of the War Revenue Act "aforesaid.

"20. That petitioners respectfully submit, that the question of "the legal and just construction of the said Act of Congress of "June 13, 1898, so far as it relates to the payment of stamps on "express receipts, and who is finally bound to pay the same, and "whether said act of Congress makes this payment a part of the "rate of carriage to be paid by the express company on local busi- "ness in Georgia, as was determined by the Railroad Commission "of Georgia, which Commission and said decision of the Circuit "Court of Appeals denied to said company the right to contract "with shippers for the payment of said stamp tax, should be finally "and authoritatively adjudged by this Court, if it has not already "done so, as petitioners contend, by the cases aforesaid."

Apart from these matters of law, there are five other states, besides Georgia, viz.: North Carolina, South Carolina, Mississippi, Florida and Arkansas, which have state railroad commissions. Those of North Carolina and South Carolina have issued substantially the same order as in Georgia, requiring the express company alone to pay the revenue tax. So that the importance of the questions at issue and their early final adjudication cannot be overestimated, not only in the territory of the Southern Express Company, but in other states which have established Railroad Commissions, namely: Ohio, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Wisconsin, New York, North Dakota, Kansas and Nebraska.

THE STATUTORY POWERS OF THE RAILROAD COMMISSION OF GEORGIA.

2. By the Act of 1879, P. L. 125, it was enacted that three commissioners be appointed by the Governor of the State of Georgia, with the consent of the Senate, that should be known as the Railroad Commission. They were given power to prevent extortion by railroads and unjust discrimination, and were charged with the duty to make "reasonable and just rates of freight and passenger tariff to be observed by all railroad companies doing business in this State or on the railroads thereof"; to make just rules and regulations as to handling and delivering freight; were required to make schedules of just and reasonable charges for the transportation of freight and passengers and to publish their rates. Any railroad company found guilty of violating these regulations was subject to very heavy statutory penalties. Fines of $1,000 to $5,000 for each offense, revocation of charter, &c., &c.

All of said laws are now grouped together in the Code of Georgia of 1895, section 2185, 2218; and in the Code of 1882, they are sections 719 (a), et seq.

See *supra*, pages 21 to end.

By the Act of October 21, 1891, P. L. 151, new Sec. 2217, Code 1895, the powers of the Railroad Commission were extended "so as to give them power and authority to regulate charges by express companies *for transportation* from point to point in Georgia."

POWER CONSTRUED.

These powers of the Commission have received judicial construction by the Supreme Court of Georgia.

So far as they bear upon the questions involved in this record, they are as follows:

In *Smith* v. *Ga. R. R.*, Decided Feb. 27, 1883, 70 Ga., 694, the constitutionality of the act creating the Commission was upheld, and on page 704, the Court say:

> "It may not be out of place, in concluding this opinion, to say "that, whilst we hold the act of October 14th, 1879, constitutional, "and the orders of the Commissioners valid and binding, yet we are "not to be understood as holding that their powers *are unlimited or "beyond legal control by the proper authorities of the State.* On the "contrary, we hold that the powers which have been conferred upon "them are to be exercised within legal and constitutional limita- "tions, *and in such way as not to invade the legal and constitutional "rights of others.* If, therefore, the case made by the complainant "against the Commissioners had shown a violation of the chartered "rights of the Company, it would have been the duty of the court, "by proper order and decree, to have restrained and enjoined them "from such violation."

This case was brought to this Court and is reported 128 U. S., 174, where the decision of the Supreme Court of Georgia was affirmed, and the powers of the Commission are held to be to provide reasonable regulations for the transportation of freight and passengers over railroads within the limits of the State and to prevent unjust rates and discriminations. (Page 178.)

Subsequently the Commission asserted the power to compel one railroad *to make a contract* with another railroad for a through bill of lading. Upon the railroad declining to comply with the order of the Commission, it was sued for the statutory penalty. In this case, *The State* v. *Wrightsville & Tennille R. R.*, decided June 7, 1898, reported 104 Ga. R., 407, the Court denied any power in the Commission as claimed, and said, page 442,

> "We are clearly of the opinion that the act of 1874 was not in- "tended by the Legislature to compel a railroad company to make "a contract against its will. * * The *voluntary act* of one "party in making a contract is quite different from the *involuntary "act* of the same party in making a like contract under duress or "compulsion. As before remarked, the voluntary act of issuing a

"through bill of lading over the Central of Georgia Railway Co.,
"cannot be construed into an act of discrimination against the Au-
"gusta Southern Railroad, there being no complaint of any differ-
"ence in rates or any refusal to deliver freight to the connecting
"roads or transfer cars, or things of that short."

On page 894 the Court say further,

"The Attorney-General relies upon the words, 'Shall make such
" 'just and reasonable rules and regulations as may be necessary for
" 'preventing unjust discrimination in the transportation of freight
" 'and passengers.' These words read in connection with the con-
"text and of the title of the act clearly mean that the commission
"should have power to prevent unjust discriminations in the rates
"and charges and to make rules for this purpose. As we have
"shown above that issuing a through bill of lading over a con-
"necting road and refusing to issue it over another is not an unjust
"discrimination within the meaning of the words used in the act.
"These words cannot be construed into meaning that the commis-
"sion can adopt rules *compelling* the railroad to issue through bills
"of lading over another road."

It will thus be seen that the commission is subject to the judical power and has *no power* to control the contractual relations of any corporation, other than the fixing of rates of transportation.

ASSIGNMENTS OF ERROR 1, 2, 3 AND 4.

3. The Commission has no existence outside of the statutory power delegated to it. This power is in derogation of common right, and will be strictly construed. The Commission has no power to *collect taxes* for the State of Georgia, or determine who is to pay them, and it certainly has none to collect those of the United states, nor to provide as to who shall pay them. What it cannot do at home it cannot do abroad. All State taxes in Georgia are levied and collected through State officers—tax receivers, collectors, etc. The only authority that the Commission has is to regulate freight and passenger tariffs, as to railroads, and, as far as express companies are concerned,

"to regulate the prices to be charged by any company * *
"for any service performed by such company."

It has no other power whatever over the company. It cannot control the internal management of the company, nor provide what insurance it shall carry upon its property, nor what taxes it shall pay thereon—but only for "service performed." It can provide that the charges of the company for transportation shall be reasonable and just. It cannot compel the company to make a contract, nor deny it the right to make an *express contract* for carriage, particularly if it does not increase the rate. In Georgia by statute a carrier can make such contract.

By Civil Code, §2276:

"A common carrier cannot limit his legal liability by any notice

"given, either by publication or by entry on receipts or tickets "sold. *He may make an express contract*, and will then be gov- "erned thereby."

The Commission proceeded erroneously to take upon itself the construction and enforcement of the Act of Congress. It concluded that the law placed the payment of the War Stamp Tax solely on the express company. It therefore ordered it to pay the Stamp Tax on receipts, and *not to contract with the shipper* to pay therefor.

It thus denied not only the right of the Express Company to make a special contract for carriage, a right that existed by statute and common law, but also erroneously construed the Act of Congress in arriving at this conclusion.

In *American Express Co.* v. *Michigan*, 177 U. S., 404, this Court held: That the act does not forbid an express company "from requiring "the shipper to furnish the stamp or the means of paying for it."

Judge Speer correctly held—before this decision was announced—that: "The revenue exaction *is no part of a rate* for the shipment of express matter." Suppose the company had refused to be bound by the order of the Commission requiring it to put on and pay for the stamps. Numerous suits would have been brought to enforce the State statutory penalties and to forfeit the charter, and that, because the express company failed to obey an erroneous construction of a Federal statute, which did not have this penalty. The power of the Commission, is, as stated to fix "the prices for any service performed." How can the payment or non-payment of a tax due the General Government be any part of a "service performed" for express transportation in the State of Georgia? It is an excise duty due to the Government on business done, but it is not a "service performed" for the Government.

Even the Government itself, acting through G. W. Wilson, Commissioner of Internal Revenue, in circular No. 570, defines the duties of carriers with respect to issuing of stamped receipts under the war revenue act, and said, as far as applicable here, as follows:

"In the case of the *American Express Company* v. *Fred A. May-* "*nard*, the United States Supreme Court has held, in an opinion "filed April 16, 1900, (Treasury Decisions, Vol. 3, No. 17, Int. "Rev. No. 100), in construing the above provision, that the ex- "press company is not forbidden from shifting the burden of the "stamp tax by an increase of rates which are not in themselves "unreasonable.

"The Court did not hold that it was not the duty of the express "company to give a duly stamped receipt to the shipper for each "shipment, but that the tax might be shifted by an increased "charge for transportation within the limits of what is reasonable.

"In conformity with the foregoing opinion the following rulings "are promulgated for the guidance of all concerned :

"(1) The obligation of every carrier receiving goods for "domestic transportation to issue a stamped receipt therefor, with "the stamp duly canceled, is absolute and without exception, "under a penalty, for failure, of fifty dollars for each offense. "The Commissioner of Internal-Revenue has no jurisdiction what- "ever in the matter of the increased rate which the Supreme Court "states the carrier may charge the shipper for the purpose of "indemnifying himself for the stamp tax, except in the case of "goods transported for the United States.

"(2) Where officers of the United States ship goods by carrier, "and the carrier has no existing contract with the United States, "whereby the said goods are to be carried at a fixed rate, the "stamped receipt must be issued to the officer by the carrier, and "the officer may pay an additional rate, not exceeding 1 cent for "any one shipment, and it will be allowed in his accounts."

It is therefore confidently insisted, that the action of the Georgia Commission is entirely outside of the scope of its powers, both as to the express company and the General Government. The opinion of Judge Speer, Record pp. 29-35, and the dissenting opinion of Judge Shelby, Record p. 61, contain the true view of the law. The Constitution of the United States gives power to Congress "to lay and collect taxes," and such can only be collected in the way pointed out by Congress. No power is given a State or its Railroad Commission, or other State officers, under the war revenue act or any other act, to in any way provide for the collection of such taxes, and their interference would in many instances, as in this, have the effect to retard, impede and control the operation of the constitutional laws enacted by Congress, which is contrary to all State authority. *McCullough* v. *Maryland*, 4 Wheaton, 316. *Weston* v. *City of Charleston*, 2 Peters, 449; Cooley on Taxation, 2nd ed., 83.

In *McCullough* v. *Maryland*, Chief-Justice Marshal (4 Wheat., 424,) after declaring the suprememacy of the National Government in all matters within the sphere of its operations and that it had the power to raise revenue for national purposes, page 409, said, page 424:

"No trace is to be found in the Constitution of an intention to create "a dependence of the government of the Union on those of the "States, for the execution of the great powers assigned it. Its means "are adequate to its ends; and on those alone was it expected to "rely for the accomplishment of it ends. To impose on it the "necessity of resorting to means which it cannot control, *which* "*another government may furnish or withhold*, would render its "course precarious, the result of its measures uncertain and create "a dependence on other governments which might disappoint its "most important designs and is incompatible with the language of "the Constitution." 4 Wheaton, 424.

In *Boske* v. *Comingore*, 177 U. S., 460; the latter was a United States Internal Collector in Kentucky and for refusing to produce in a State Court documents of file in his office, was adjudged in contempt and sent to jail. Subsequently the United States Court, 96 Feb. R. 552, denied the right of the State Court to so act, and discharged him from custody, holding that his imprisonment was in violation of the Constitution and laws of the United States. In the opinion Judge Evans says, 96 Fed. 560:

> "The United States has complete revenue system of its own, and
> " equally so has the State. They are, and must necessarily be,
> "entirely independent of each other."

On appeal this decision was affiirmed. 177 U. S. 467.

If such action of the State Commission is allowed to be unchecked, it would simply be an entering wedge to further encroachment by State officers upon the exclusive right of the Federal Government, which are wholly exempt from any such interference. The right of the States or their officers to so interfere has been denied from the foundation of the Government, and it is necessary, for its maintenanace and preservation, that this should continue.

The Commission said—and the Circuit Court of Appeal has affirmed it, that the Express Company alone shall pay this tax, and that the shipper shall not. When on the contrary this Court has said that the Company may not pay the tax, but that it may contract with the shipper to so do. *Am. Ex. Co.* v. *Michigan*, 177 U. S. 404. Which shall prevail? Assuredly the latter.

The Circuit Court of Appeals therefore erred in affirming the order of the Commission.

ASSIGNMENTS OF ERROR 5, 6, AND 7.

The Circuit Court of Appeals, by two of its Judges, held that the addition of the one-cent stamp on express receipts which the company desired to contract with the shipper to be paid by the shipper, would

> "manifestly discriminate, largely and unjustly, between the
> "shipper of a small package for a short distadce at a low rate and
> "a shipper of a larger package for the longer distance at the larger
> "rate."

This ruling is contrary to the decision of this Court, in *American Express Co. vs. Michigan*, 177 U. S. Reports, 404, where this Court said, page 408 :

> "We do not however understand the remarks on this subject as
> "implying that the Court below decided that the rate as increased
> "by the one-cent was intrinsically unreasonable without regard to
> "the provisions of the act of Congress, but only that the rate as so

"increased was unreasonable, because an attempt on the part of the "express company to shift the burden of the tax imposed upon it "by the act of Congress, and hence was by legal inference forbid- "den by that act."

Again:

"As there was no allegation that the rates existing prior to the "imposition of the one-cent stamp tax were unreasonable, it would "follow that the rates which were otherwise reasonable were "decided not to be so solely because there was added to the charge "for each package the exact amount of the increased cost for "transporting the package, occasioned as to each package, by the "specific imposition on each by the act of Congress of the one-cent "stamp tax. But to cause rates which were conceded to be rea- "sonable, *to become unreasonable, because alone of such increased "charge*, the assumption must be made, that the act of Congress, "not only imposed the burden of the tax solely on the express "company, but also forbade its shifting the same by any and every "method."

Page 414:

"Nor is the fact that the express company is a common carrier "engaged in a business in which the public has an interest and "which is subject to regulations, of importance in determining the "correctness of the proposition relied upon. The mere fact that "the stamp duty is imposed upon a common carrier does not divest "such tax of one of its usual characteristics or justly imply that "the carrier is in consequence of the law deprived of its lawful "right to fix reasonable rates. * * * As previously "pointed out, to decide as a matter of law that rates are essentially "unreasonable, from the mere fact that their enforcement will op- "erate to shift the burden of a stamp tax, would be in effect but "to hold, that the Act of Congress by the mere fact of imposing a "stamp tax forbids all attemps to shift it, and consequently that "the carrier is deprived by the law of the right to fix rates, even "although the limit of reasonable rates be not transcended. This "reduces the contention back to the unsound proposition which we "have already examined and disposed of."

The carrier is not called upon to answer a charge of discrimination against a shipper for what he voluntarily does, nor can there be any discrimination charged against a carrier in contracting for the payment of a constitutional tax, nor where the constitution provides that such tax shall be "*uniform throughout the United States.*" The stamp on a letter going a short or long distance, is 2 cents, and is uniform throughout the United States. A stamp on an express receipts, whether given for a package to be carried a long or a short distance, is one cent and is

uniform throughout the United States. The Government charges for stamps in each case. The Express Company gets no part of the one cent—it is no part of the rate. The Circuit Court of Appeals confounded an excise tax duty, imposed by the Federal Government, and due to it upon a voluntary transaction entered into by a shipper with an express company, for the carriage of goods—with what was a reasonable rate to be paid the carrier for the carriage of the goods. The Court overlooked constitutional requirement that all such excise duties "shall be uniform throughout the United States," that is, geographically. *Knolton* v. *Moore*, May 14, 1900. Even it operates unequally. *Ib.*

Such a duty or stamp tax is no part of a rate of carriage for a "service performed" by the Company. Such stamp tax is really an expense to the person using the facilities taxed. A letter—the property of the sender—may be forwarded to its destination by mail or by hand. If sent by mail, a stamp of two cents must be placed thereon, whether the letter is to go a short distance or a long distance. This payment to the General Government is for the facilities afforded by the mail—protection against loss of property, quick carriage, etc. So, also as to express matter—a package may be sent by express or by hand. The facilities and protection afforded by the express company are similar to the facilities and protection afforded by the carriers of the United States mail. The package—the property of the sender—is quickly and safely carried. There is no tax laid by the revenue act upon the express company, *until* there is something carried by express, and then on the transaction of shipment. Therefore, before the shipper by express causes the exercise of these transportation facilities, and raises the necessity for the payment of the tax, he, as in the case of the sender of a letter by mail, should pay the stamp tax on the transaction he originates.

The Court erred therefore when held as matter of law, and without any evidence, that the one-cent charge would discriminate against a sender of a small package for a short distance as against the sender of a large package for a longer distance.

Again. The Circuit Court of Appeals, while recognizing the construction given the act of Congress by this Court in the case of *American Express Co.* v. *Michigan*, 177 U. S. 404, misapplied the same. The majority of the Court said that the War Revenue act,

> "does not purport to fix or affect the rates which carriers might "charge for transportation, for the act of Congress neither prohibits "nor authorizes such an increase of rate; neither expressly nor by "implication does it contain any provision on the subject"—

and yet it held that if the shipper was required to pay this tax it would be unjust in the instance given, notwithstanding the fact that this Court had in the case above-mentioned decided that it was the right of the express company to contract with the shipper as to the payment of said tax, and that if the rstes existing before the imposition of the one cent tax were reasonable, that they would not become unreasonable by the imposition upon the shipper of the tax above-stated. To make this act of the carrier unreasonable the act of Congress must have put the tax

solely on the express company and forbade it from shifting the same by any method to the shipper. *Express Co.* v. *Michigan* 177 U. S. 414. This Court held in that case that this the act did not do, there it was shown that the Express Company had a right to contract with the shipper for the payment of the stamp, even if the tax was laid primarily upon the company.

It is now insisted that the tax *is not primarily laid upon the express company*. The act of Congress lays the tax on the party

"who shall make, sign or issue the same (the receipt,) or *for "whose use or benefit* the same shall be made, signed, or issued."

Who is the person to be benefitted by making and issuing of the receipt? It is unquestionably the shipper. In making a shipment a shipper delivers his property in the hands of the express company for transportation. If he receives no receipt therefor,—which, by the way, it is and has always been the custom of the express business to issue, irrespective of any act of Congress—he would have nothing to show that the company had received his property or was liable for its value in case of loss. So that the making and issuing of the receipts is for the "benefit" of the shipper. As the shipper by express need not resort to this method of transporting his property, as he can send it by a special messenger or a traveling friend, it is unquestionably for the "use" and "benefit" of the shipper, that a receipt is required to be issued, stamped and cancelled. The shipper is the person benefitted, because he alone would have posession of the receipt to produce in court, in case of a suit against the company for loss or damage of his property. The receipt is entirely for his protection, and to be legal, must be stamped, and as the last expression of the law-making power is, that the stamp shall be placed upon the document by the person for whose benefit the same is made, signed, or issued, the law unquestionably places the legal duty of affixing the stamp upon the shipper.

It is to be borne in mind that the express company pays taxes in every State upon its property there located, and towards the public it occupies the position of one awaiting employment. The Government practically says to the public,

> If you employ that means of transportation a stamp must be paid by the person for whose benefit it is done.

It is, therefore, a proper construction of the law to hold that this duty is primarily laid upon the shipper.

In construing this very act of Congress, the Court in *Knowlton* v. *Moore*, decided May 14th, 1900, said:

> "We are therfore bound to give heed to the rule, that where a par-
> "ticular construction of a statute would occasion great inconven-
> "ience, or produce inequality and injustice, that view is to be
> "avoided if another and more reasonable interpretation is present
> "in the statute."

There is present in the statute a question as to whether the tax is pri-

marily laid upon the express company or the shipper. To put it entirely upon the company, as is shown in this case, involves the loss of $42,000 a year in the State of Georgia alone. It could not have been the intention of Congress to tax this company to that extent on its Georgia business. How much fairer it would be to require the tax to be paid by the man who had bought or hired for the transportation of his property, the facilities of the express company. No injustice is done the shipper thereby, and great inequality in taxation and injustice to the express company is avoided. We therefore insist that the tax, by act of Congress, is primarily laid upon the shipper, apart from the right of the express company to contract with the shipper for the payment of the tax.

ASSIGNMENTS OF ERROR 8 AND 9.

The majority of the Court of appeals ordered the bill dismissed; and as a reason said (record 59):

> "There is no statement whatever of amount of income of the com-
> "pany from its Georgia bussness (intra-state business,) nor from
> "its business (interstate business), nor from both together, either
> "gross income or net income or profits of the company."

It is insisted that this is not a fair statement of the case particularly when there was no special demurrer on this ground. The bill showed that out of every dollar of gross income received by the Company from its Georgia business, it cost the express company 93c. to do business: 50 cents went to the railroad for carrying express matter, 43 cents for its expenses. This only left 7 cents as income which was further reduced by 2½ per cent. state taxes on the gross income, which left a net income of only 4½ per cent, and this 4½ per cent. would be further reduced by $42,000 a year if the company was required to pay for the stamp on express receipts.

This would show of itself that the rates were unreasonable—that not a sufficient profit was allowed to be made out of the money invested in the company. If the amount of the capital of the company was alleged, and which could easily have been done by amendment if opportunity had been given, the whole amount of its income and the whole amount of its net profits from all sources whatever, the only way the Court could arrive at the fairness of the rates was to show what *per cent.* of profits resulted. The bill simply saved the Court this labor, by alleging what was the ultimate result. The idea that there should have been an allegation as to what was the net profits of interstate business we submit is unsound. The questions only involved the intra-state business, and what was received from interstate business could cut no figure in the transaction.

The majority of the Court of Appeals in holding the bill defective for failing to state the income divided from inter-state business overlooked the decision of in *Smyth* v. *Ames*, 169 U. S. 467, where this Court say, p 541:

> "In our judgement, it must be held that the reasonableness or "unreasonableness of rates prescribed by a State for the transporta- "tion of persons and property wholly within it limits *must be deter- "mined without reference to the interstate business* done by the carrier, "*or to the profits derived from it.* The State cannot justify unrea- "sonably low rates for domestic transportation, considered alone, "upon the ground that the carrier is earning large profiits on its "inter-state business, over which, so far as rates are concerned, the "State has no control. Nor can the carrier justify unreasonably "high rates on domestic business upon the ground that it will be "able only in that way to meet losses on its interstate business. So "far as rates of transportation are concerned, domestic business "should not be made to bear the losses on interstate busines, nor "the latter the losses on domestic business. It is only rates for the "transportation of persons and property between points within the "State that the State can prescribe; and when it undertakes to pre- "scribe rates not to be exceeded by the carrier, it must do so with "reference exclusively to what is just and reasonable, as between "the carrier and the public, in respect of domestic business."

The Circuit Court of Appeals, Record 58, also said:

> "It is true, but wholly immaterial, that the commissioners held "and expressed the view that the war revenue act imposes the tax "in question exclusively upon the carrier and precludes it from "relieving itself of the expense of affixing and cancelling the stamp "required to be attached to each bill of lading, manifest, or other "evidence of receipt, by passing that expense on to the shipper "and requiring him to submit to an increased rate to that extent. "This construction is unsound, but as we have just said, wholly "immaterial, for the Act of Congress neither prohibits nor author- "izes such an increase of rates." * * The laws of Georgia and "requirements of the Railroad Commission in pursuance thereof "and in accord therewith, while the limitations of the fourteenth "amendment of the Constitution of the United States are observed, "not only affect but control this carrier as to its Georgia business "and prohibit it from increasing its charges beyond the maximum "rates prescribed by the Commission."

No laws of Georgia are set out except the authority to regulate rates. The Code of Georgia, section 2276, authorizes the carrier to make an express contract. This Court say the stamp duty is an indirect tax, capable of being shifted, and in the same case, 177 U. S. Reports, 418, decided that the Court below erred in holding that by the Act of Congress the express company was forbidden from shifting the

burden of the stamp tax by an increase of rates which were not in themselves unreasonable.

The rates in Georgia before the passage of the War Revenue Act were barely sufficient to enable the Company to live, only yielding to its stockholders an income of 4½ per cent. If the stamp duty is also to be charged against this income then the rates enacted by the Railroad Commission of Georgia are unreasonably low, and the Commission has failed to observe "the limitations of the fourteenth amendment of the "Constitution of the United States," and neither the express company nor its stockholders are bound by the orders of the Commission. If the four and half per cent. income is further reduced by the stamp duty of $42,000 a year a fair income on the money invested in the Company does not result, especially when *seven per cent.* is the legal rate of interest in Georgia, and is the rate exacted in all accountings and the closing of fiduciary relations.

Again, it is not within these constitutional "limitations" for the Commission to say who shall pay the stamp duty.

The Express Company had the right to file a cross bill, in which these matters would have been set out in detail, but the Commission appealed from Judge Speer's interlocutory decision before such action was had under the rules. Therefore the Circuit Court of Appeals in directing a dismissal of the bill when there was no special demurrer for failure to state the capital stock, income, etc., acted prematurely and beyond its jurisdiction.

It is respectfully insisted that the decision of the Circuit Court of Appeals dismissing the bill should be reversed.

Respectfully submitted,

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CONSTITUTION AND STATUTES CITED ON BRIEF.

Constitution, 1877, Art. 4. Sec. 2; par. 1; Code 5797.

"The power and authority of regulating railroad freight and passenger tariffs, preventing unjust discriminations and requiring reasonable and just rates of freight and passenger tariff are hereby conferred upon the General Assembly, whose duty it shall be to pass laws from time to time to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this State, and to prohibit such roads from charging other than reasonable rates and enforce the same by adequate penalties."

Act of Oct. 14th, 1879, P. Laws 125 now section 2190. Civil Code of 1895:

"That said railroad commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this State as soon as practicable a schedule of just and reasonable rates of charges for transportation of passengers and freight and cars on each of said railroads."

Section 3, now section 2187 of the Civil Code of 1895 is as follows:

"If any railroad corporation, organized or doing business in this State, under any Act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license, or permission to use, operate or control, the same shall be deemed guilty of extortion, and upon conviction thereof, shall be dealt with as hereinafter provided."

Code of 1895, section 2196:

"If any railroad company doing business in this State, by its agents of employees, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than one thousand dollars, nor more than five thousand dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall be in any county in the State, where such violation has occured or wrong has been perpetrated, and shall be in the name of the State of Georgia. The commissioners shall institute such action through the Attorney-General or Solicitor-General, or such other Attorney at law of this State as the said commissioners may appoint, whose fees shall be the same as now provided by law. The commissioners shall have the power, in their discretion, to institute suit, without notice, for any violation of said rules and regulations, whenever in their opinion the circumstances authorize it, of which they shall be the sole judges; and after the institution of said suit there shall be no settlement of the same without the consent of the commissioners.

Code, 1895, section 2197.

"That if any railroad company doing business in this State shall, in violation of any rule or regulation provided by the commissioners aforesaid, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury in the county where the same was done, in any Court having jurisdiction thereof, and the damages to be recovered shall be the same as in actions between individuals, except that, in cases of willful violation of law, such railroad companies shall be liable to exemplary damages: *Provided*, that all suits under this Act shall be brought within twelve months after the commission of the alleged wrong or injury.

ACT OF OCTOBER 21, 1891, P. LAWS 151. NOW SECTIONS 2217-2218 OF THE CODE OF 1895.

SECTION 2217. "All companies or persons owning, controlling or operating a line or lines of *express* or telegraph, which are in whole or in part in this state, shall be under the control of the Railroad Commissioners of this State, who shall have full power to regulate the prices to be charged by any company or persons owning, controlling or operating any such line or lines, for any service performed by such company or persons, and all the powers given to said commissioners over railroads, in this state, and all the penalties prescribed against railroad companies or persons operating railroads, are hereby declared to be of force against corporations, companies, or a person or persons owning, controlling or operating a line or lines of express and telegraph, doing business in this state, whose line or lines is or are, wholly or in part, in this State, so far as said provisions can be made applicable to any corporation, person or persons, owning, controlling or operating a line or lines of express and telegraph. The said commissioners shall also have power and authority to require said companies to locate agencies at railroad stations.

SEC. 2218. The powers of the commissioners to regulate charges by corporations, companies and persons herein referred to, shall apply only to charges by express for transportation from one point to another in this state, and to messages sent by telegraph from one point to another in this state.

CODE 1895, SECTION 2276.

A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. *He may make an express contract*, and will then be governed thereby.